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No. 98-2060

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

RONALD D. EDWARDS, WARDEN,

PETITIONER.

vs.

ROBERT W. CARPENTER,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF RESPONDENT FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 39 of this Court's Rules of Practice, Respondent moves this Court for leave to proceed *in forma pauperis* and to file the attached Brief in Opposition to Petition for a Writ of Certiorari in accordance with Rule 33.2 of the Rules of Practice.

Respondent was represented by counsel appointed by the United States Court of Appeals for the Sixth Circuit pursuant to 18 U.S.C. §3006A.

Respectfully submitted

Dated: October 8, 1999

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ROBERT W. CARPENTER,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald D. Edwards, the Warden of Ohio Correctional Reception Center ("the Warden"), contends that his petition for a writ of certiorari "presents an important question of federal habeas procedure on which the circuit courts of appeals are now divided. The question is whether the procedural default of an ineffective-assistance-of-counsel claim precludes the claim from serving as cause for the procedural default of other claims presented on federal habeas." (Pet. at 3). For reasons that follow, Respondent Robert W. Carpenter ("Carpenter") submits that the question presented is not "important" - - this Honorable Court has already decided it. Moreover, the federal appellate circuits are not divided on this question. The reported opinions cited by the Warden are all distinguishable on the facts from those found in the record in the instant case.

I.

In *Murray v. Carrier*, 477 U.S. 478, 489, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397 (1986), this Court observed that an ineffective assistance of counsel claim may be asserted as "cause" to excuse a procedural default and/or may be denominated as an independent constitutional ground for habeas relief. As would be true in the case of any claim involving an alleged deprivation of the prisoner's federal constitutional rights in a state criminal proceeding, the petitioner who desires to have his claim of ineffective assistance of counsel reviewed by the federal habeas court *as an independent ground for relief* must first present his claim to the state courts in accordance with any applicable state procedural rules and obtain a ruling by the state courts on the merits of such claim. If the petitioner does not succeed in obtaining a ruling on the merits from the state courts due to non-compliance with

an applicable rule of procedure, the federal habeas court will not consider the merits of such claim unless he can demonstrate "cause" for the procedural default and "prejudice" resulting therefrom. *Coleman v. Thompson*, 501 U.S. 722, 748, 111 S.Ct. 2546, 2563, 115 L.Ed.2d 640 (1991).

However, when ineffective assistance of counsel is raised by the habeas petitioner as "cause" for avoiding the bar of procedural default with respect to some other federal constitutional claim, it is sufficient that he has presented the issue of ineffective assistance to the state courts and provided those courts with the opportunity to correct any deprivation of the petitioner's Sixth Amendment right to counsel. *Carrier, supra*. This Court imposed a duty on the habeas petitioner to exhaust his claim of ineffective assistance in the state courts out of concerns of comity. The majority expressed its belief that a federal court should be loath "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Id.* (quoting *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed.2d 761 (1950)).

The question of whether a habeas petitioner has demonstrated adequate "cause" within the meaning of the "cause" and "prejudice" exception to the waiver rule is a matter exclusively within the province of the federal courts. A state court would have no reason to decide, and frankly would have no business deciding, whether a federal district court, in a future habeas proceeding, should excuse a state prisoner's procedural default due to ineffective assistance of counsel in the state criminal proceedings. That determination is one to be made by the federal court in the first instance. The Sixth Circuit had it exactly right when it concluded that "[a] careful reading of *Murray* [*v. Carrier*] makes clear that the

Supreme Court was concerned only that a federal court not infringe on a state court's right to decide issues pertaining to the state court conviction first, and thus felt that an exhaustion requirement, one that had not previously been required in reference to the cause element, needed to be implemented." (Pet. App. at 10a).

II.

Notwithstanding the clear direction of *Murray v. Carrier* on this question, the Warden raises the spectre that if the plain language of this Court's opinion is followed by the federal district and circuit courts, and the habeas petitioner is excused from complying with the time requirements of the state procedural rules for the raising of such claims, "long-since-defaulted claims can come springing back to life" many years after the petitioner's state conviction has become final. (Pet. at 14). As a result of the decision by the Sixth Circuit in Carpenter's case, according to the Warden, "the State is now left with no finality at all." (Pet. at 15).

The Warden can relax. A one year period of limitation applies to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. 28 U.S.C. §2254(d)(1). Subject to a few narrow exceptions not pertinent here, the one year time period runs from the date on which the state judgment of conviction becomes final following the conclusion of direct review in the state appellate courts or the expiration of the time for seeking such review. 28 U.S.C. §2254(d)(1)(A).

Although the time during which a properly filed state application for post-conviction or other collateral review does not count toward the one year limitation period, 28 U.S.C. §2254(d)(2), it is readily apparent that if the state prisoner does not present his claim of ineffective assistance of counsel to the state court by filing a post-conviction petition within

a period of one year from the date of the conclusion of his direct appeals to the state appellate courts, any federal habeas petition which is filed after the adjudication of the state post-conviction petition and which raises ineffective assistance of counsel as "cause" for a procedural default of a primary constitutional claim will be dismissed as a direct result of judicial enforcement of the bar of the federal one year statute of limitations.

In short, the federal statute of limitations protects the states from stale claims belatedly lodged by prisoners alleging deprivation of their constitutional rights during the state criminal proceedings. It accomplishes this by engrafting upon the rule in *Murray v. Carrier* a requirement that the petitioner must present his claim of ineffective assistance of counsel to the state courts no later than one year from the date of expiration of his direct appeals, or forever be barred from raising his primary defaulted constitutional claim(s) in a federal habeas action. If the petitioner misses the federal filing deadline, the question of "cause" becomes irrelevant.

This should present no difficulties to law enforcement and prison officials in states such as Kentucky[1] and Tennessee, which, according to the Warden, impose a three year and a one year time limit respectively on their post-conviction remedies for raising ineffective assistance claims. (Pet. at 14, n. 3). The fact that the State of Ohio has chosen to establish an arbitrarily shorter limitations period of 90 days (absent a showing of good cause) for the raising of claims of ineffective assistance of appellate counsel is hardly

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[1]In Kentucky, a state prisoner who waits more than a year to file his post-conviction petition but complies fully with the state's three year limitation period will be in no better position, as far as the federal habeas court is concerned, than a prisoner who files his post-conviction petition beyond the three year limitation period. The federal court will dismiss both of their habeas petitions on the basis of the expiration of the federal one year statute limitations..

grounds for jettisoning sound prior case precedent of this Court or for overruling the well-reasoned decision of the court of appeals in this case.

III.

The Warden and the *Amici* state officials contend that the Sixth Circuit opinion in Carpenter's case "has created confusion and conflict among the lower courts." (*Amici* Br. at 9). In support thereof, they cite a hodge-podge collection of *dicta* from reported cases involving inapposite procedural facts. A review of the opinions in the cited cases reveals that the final dispositions of those appeals are not inconsistent with the Sixth Circuit's opinion and judgment in *Carpenter* and that any "confusion" has more to do with the Warden's and the *Amici' s* quoting sweeping language from these opinions out of the context of the particular facts before the respective circuit courts of appeals.

In *Reyes v. Keane*, 118 F.3d 136 (2d Cir. 1997) and *Pisciotti v. Washington*, 143 F.3d 296 (7th Cir. 1998)[2], the petitioners failed to present the issue of ineffective assistance of appellate counsel to the state courts in any type of available proceeding for collateral review of their convictions. The *Carpenter* court correctly noted that *Reyes* (and by implication, *Pisciotti*) stands for the proposition that "a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under *Murray* [*v. Carrier*]." (Pet. App. at 12a).

[2]In *Piscotti*, the state court of appeals rejected the petitioner's claim of prosecutorial misconduct during jury arguments because trial counsel failed to object. In his state post-conviction petition, petitioner raised the ineffective assistance of trial counsel for the first time, but failed to raise the ineffectiveness of appellate counsel for failing to raise ineffective assistance of trial counsel in the original appeal. The state post-conviction court denied relief. In a federal habeas petition, petitioner raised the ineffectiveness of *both* trial and appellate counsel as cause for avoiding default of his constitutional claim of prosecutorial misconduct. Since the petitioner never presented the issue of effectiveness of appellate counsel to the state courts in any form, he failed to satisfy the exhaustion requirement of *Murray v. Carrier*.

In *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996), the petitioner waited until after the federal district court had already entered its judgment denying habeas relief before he made any effort to raise the ineffective assistance of counsel as "cause" for his procedural default. The Eleventh Circuit held that the petitioner was precluded from raising ineffective assistance as "cause" on appeal because "this argument was not fairly presented to the district court." *Id.*, 81 F.3d at 1029. The appellate panel's ensuing discussion concerning its view regarding the proper interpretation of *Murray v. Carrier* was entirely advisory and amounted to *obiter dictum* in the truest sense of that term.

In *Harris v. Lockhart*, 948 F.2d 450 (8th Cir. 1991), the petitioner presented his ineffective assistance claim to the state court in a petition for a writ of *coram nobis*, rather than a petition for post-conviction relief. The state court declined to rule on the ineffectiveness claim because such a claim can only be raised in a post-conviction petition. The Eighth Circuit affirmed the district court's refusal to consider ineffective assistance of counsel as "cause" for avoiding procedural default with respect to the petitioner's primary constitutional claim involving error in jury selection. The court of appeals held that the petitioner, by using the wrong state procedure, denied the state courts an opportunity to consider his claim of ineffective assistance of counsel on the merits. This result is not inconsistent with the view of the Sixth Circuit in Carpenter's case.

Justus v. Murray, 897 F.2d 709 (4th Cir. 1990) was a very simple case of a habeas petitioner's failure to exhaust an available state right of appeal. The petitioner had first raised the issue of ineffective assistance of appellate counsel in a state habeas petition. After the state trial court denied the petition, the petitioner appealed to the state supreme

court, but did not assign as error the trial court's adverse ruling on his ineffective assistance claim. Under the holding of this Court in *Ex Parte Hawke*, 321 U.S. 114, 64 S. Ct. 448, 88 L.Ed.2d 572 (1944), as well as provisions of 28 U.S.C. §2254(c), the petitioner's failure to exhaust his state appellate remedies with respect to the ineffectiveness claim precluded federal court review. The ultimate decision reached by the Fourth Circuit to deny the habeas petition was correct, and some gratuitous and impertinent language in the opinion notwithstanding, is not in conflict with the judgment of the Sixth Circuit in Carpenter's case[3].

The Warden and *Amici* have not demonstrated a conflict among the Circuits "on the same important matter" within the ambit of Rule 10(a) of this Court. In each of the cited opinions, the respective circuit court of appeals reached a result that is not inconsistent or in conflict with the Sixth Circuit's judgment in the instant case.

CONCLUSION

This Court will exercise jurisdiction and grant certiorari sparingly and "only for compelling reasons." Rule 10(a), Rules of Practice. The Warden has not demonstrated the existence of such "compelling reasons" under the factors listed in the Rules of Practice. This Court's limited time and resources should be reserved for truly meritorious cases. This case does not rise to such a level.

[3]Carpenter appealed the judgment of the Ohio Court of Appeals, denying his application to reopen his appeal, to the Ohio Supreme Court. (Pet. at 8). When the state supreme court denied further review, Carpenter (unlike the petitioner in *Justus*) exhausted all of his available state remedies with respect to his claim of ineffective assistance of appellate counsel.

Carpenter prays that upon review of the briefs in support and opposition, this Court will deny the petition for a writ of certiorari.

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